

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

APPEAL FROM ORDER NO.619 OF 2005
IN
NOTICE OF MOTION NO.4704 OF 2003
IN
S.C. SUIT NO.5655 OF 2003

WITH
CIVIL APPLICATION NO.425 OF 2005

M/s.Three Circles

Appellants

vs.

Maharashtra State Road

Development Corporation Ltd. & ors.

Respondents

Mr.H.Toor with Mr.S.B.Pawar i/b.M/s.S.K.Legal
Associates for the appellant.

Mr.C.J.Sawant, senior counsel with Mr.P.P.Chavan with
Mr.Vinay M. Bhate for the respondent no.1.

CORAM : B.H. MARLAPALLE,J.

ORDER RESERVED ON : 31ST August 2005

ORDER PRONOUNCED ON: 15th September 2005

P.C.

This appeal has been filed against the order dated 4.12.2004 passed by the learned Judge of the City Civil Court, Mumbai partly allowing Notice of Motion No.4704/2003 moved in L.C.Suit No.5655/2003. The said Suit has been filed by the present respondent and the appellant has been impleaded as defendant no.1. Whereas the defendant no.2 is the Arbitrator appointed by the defendant no.1 and intimated to the plaintiff vide letter dated 8.4.2003. The defendant no.1 had received

the work order on 12.3.1999 pursuant to his tender offer dated 11.1.1999 for construction of division road outside Chalisgaon town to the Solapur-Aurangabad-Dhule Road (MSH No.1). The said contract was terminated by the plaintiff and the work was withdrawn from the defendant-appellant under clause 3(a) of the Contract on 23.10.2002. As per the appellant, its efforts for referring the dispute for arbitration under clause 13 of the agreement did not receive any response and, therefore, it proceeded to appoint the defendant no.2 as the sole Arbitrator who claims to have held proceedings on 9.4.2003 and called upon the plaintiff and the defendant no.1 to attend the arbitration meeting fixed on 16.4.2003. The plaintiff which is a Government of Maharashtra Undertaking addressed a letter dated 16.4.2003 to the defendant no.2 and pointed out that as per the tender/contract signed between the parties the dispute and claims are required to be referred to arbitration under clause 13 and the said agreement did not provide for any other remedy of arbitration. Under the circumstances, the appointment made by the defendant no.1 as sole arbitrator was illegal. It was also pointed out that Writ Petition No.944/2003 was filed by the defendant no.1 before this Court seeking directions for settlement of the pending claims. An application for ad-interim relief was also moved in the said petition before the Division Bench and the petitioner

failed to get any such relief. The defendant no.2 held the meeting of arbitration on 16.4.2003 which was attended only by the defendant no.1 and the sole arbitrator passed the following order:

"The statement of claim to be filed by the claimants on or before 30th April 2003. The respondents to file the written statement and counter claim, if any, on or before 24th May 2003. Reply to be filed by the claimants on or before 4th June 2003. Discovery and inspection in the matter to be completed by 9th June, 2003. Parties to file compilation of the documents both admitted and not admitted on or before 9th June 2003. The arbitration meetings for hearing will be held on 12th June 2003 at 11 a.m.

2. By a letter dated 30.4.2003 addressed to the defendant no.2, the plaintiff re-iterated that the defendant no.2 had no jurisdiction to arbitrate upon the disputes between the parties and award, if any, passed exparte shall not be binding on the plaintiff. On 10.5.2003 the defendant no.2 addressed a letter to the parties and informed that the arbitral forum will decide the issue of jurisdiction/reference as per Section 16 of the Arbitration and Conciliation Act, 1996 in due course after hearing both the parties and directed the parties to attend the next arbitral meeting scheduled on 16.5.2003 and on 12.6.2003 the plaintiff placed two submissions before the sole arbitrator pointing out that clause 13 of the agreement envisaged that disputes and

differences arising between the Engineer in Charge and the contractor shall be referred to the Superintending Engineer who shall decide the matter and if the contractor is aggrieved by the order of the Superintending Engineer there was a provision to file an appeal to the Chief Engineer and second appeal to the Managing Director of the plaintiff. The decision of the Managing Director shall be final and binding on the contractor. It was also pointed out that Writ Petition no.944/2003 was moved by the contractor during the summer vacation on 9.5.2003 and the petitioners could not get any relief. Under these circumstances, it was claimed by the plaintiff that the reference to arbitration by the claimants was misconceived, untenable and bad in law and, therefore, it was liable to be rejected with costs. The plaintiff claims that the sole arbitrator directed it to settle the professional fees amount of Rs.1,40,000/-. On or about 24.11.2003 it approached the City Civil Court by filing S.C.Suit No.5655/2003 for the relief of declaration and injunction. At the first instance, it prayed for declaration that the reference of the arbitration made by the defendant no.1 to defendant no.2 was illegal, bad in law and contrary to the terms of the agreement between the plaintiff and defendant no.1. By way of injunction, it prayed to refrain from proceeding with the reference made by the defendant no.1 to defendant

no.2. In Notice of Motion No.4704/2003 the following

prayers were made by the plaintiffs:

- a) Pending the hearing and final disposal of the suit, the Defendants by themselves, their servants and agents be restrained by an order of injunction of this Hon'ble Court from proceeding with the reference made by Defendant No.1 to Defendant No.2 in relation to the tender work referred to in the Suit.
- b) Pending the hearing and final disposal of the Suit, the Defendant No.1 by themselves their agents and servants be restrained by an order of injunction of this Hon'ble Court from referring the alleged disputes/differences of opinion to any other arbitrator for adjudication.

3. By the impugned order the trial Court has granted the prayer clause (a) above and, therefore, this appeal by the defendant no.1.

4. While the defendant No.1 does not dispute the provisions of clause 13 of the tender/contract regarding the arbitral reference to the Superintending Engineer, the appeal remedy before the Chief Engineer and the Second Appeal to the Managing Director of the plaintiff, it is submitted by the learned counsel for the appellant that the issue of legality of the appointment of the sole arbitrator is required to be considered by the arbitrator himself under Section 16(2) of the Act and, therefore, it was not permissible for the trial Court to pass an order of injunction by allowing the notice of

motion partly. The learned counsel for the appellant relied upon the following observations in the order passed by the Supreme Court in the case of Kvaerner Cementation India Ltd. v. Bajranglal Agarwal & anr.,

2001(6) Supreme 265:

"There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an arbitral Tribunal. But, bearing in mind the very object and with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the arbitral Tribunal to rule on its own jurisdiction including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the Civil Court cannot have jurisdiction to go into that question. A bare reading of Section 16 makes it explicitly clear that the arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised and a conjoint reading of sub-sections (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act. In this view of the matter, we see no infirmity with the impugned order so as to be interfered with by this Court. The petitioner who is a party to the arbitral proceedings may raise the question of jurisdiction of the Arbitrator as well as the objection on the ground of non-existence of any arbitration agreement in the so-called dispute in question and such an objection being raised, the Arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings."

5. Mr.Sawant, the learned senior counsel appearing for the plaintiff, on the other hand, submitted that the appointment of the arbitrator can be made under Section 11 and the arbitral tribunal must also satisfy the requirements of Section 10 of the Act. As per the learned counsel, the terms of agreement did not provide for arbitral reference to any outside agency or to a third party and in the absence of such a clause, the appointment of the sole arbitrator made unilaterally by the defendant no.1 is an illegal appointment and thus, the arbitral tribunal has no foundation in law. In such a situation, it is not necessary for the plaintiff to appear before the sole arbitrator and wait for the adjudication by such tribunal on the issue of legality of its own appointment. Such an issue cannot be decided under Section 16 of the Act, as per the plaintiff. While submitting that the order relied upon by the appellant in the case of Kvaerner Cementation (supra) is not applicable to the facts of the present case, Mr.Sawant relied upon the subsequent decision of the Supreme Court in the case of Dharma Prathishthanam v. Madhok Construction (P) Ltd., **(2005)9 SCC 686** in support of his contention that the trial Court has rightly granted the injunction.

6. The order of the Supreme Court in the case of Kvaerner Cementation (supra) arose from the dismissal of

A.O.No.695/2000 by this Court on 20.11.2000. Mr.Sawant, the learned senior counsel is right in his contentions that the facts in A.O.No.695/2000 arising from S.C.Suit No.5812/1999 were quite different. It is evident from the following observations made by the trial Court in its order dated 6.7.2000 in S.C.Suit No.5812/1999 that prima facie there was a clause of reference for arbitration which was invoked by the supplier.

"The plaintiff took the delivery and has made part payment under the bills to defendant no.1. Therefore, the purchase orders by the defendants do not constitute a concluded contract. They were only proposals given by the plaintiff to defendant no.1 Defendant no.1 supplied the goods and raised bills against the plaintiff. The xerox copies of the bills are annexed at Exhs. B1, B2 and B3 to the plaintiff. These bills also contain all the particulars of the goods. These bills refer to the quantity, rate and the amount. The bills have been signed by the representative of defendant no.1 and also signed by the representative of the plaintiff. The signatures of the plaintiff are found made at two places. One is at the time of receipt of the bill and second at the time of payment made on 11.2.1998 and 26.3.1998. In the circumstances, the terms and conditions of the contract between the parties would be the terms and conditions in the purchase order coupled with the terms and conditions in the bills raised by defendant no.1 The bills raised by defendant no.1 contain a specific condition i.e. condition no.5 which reads as follows:

"If any dispute arises regarding the goods sold under this bill the same shall have to be referred for decision to Bharat Merchants Chamber or arbitration under the rules of said chamber."

. The arbitral tribunal was constituted by the Bharat Merchants Chamber and the plaintiff had taken objection to the same purportedly on the ground that the arbitral tribunal appointed by the chamber was illegal and contrary to the agreement for supply of goods. The trial Court in the above referred observations had recorded a prima facie existence of arbitration by the Bharat Merchants Chamber or under its rules. Whereas in the instant case, it is an admitted position that in the agreement the arbitral reference has been provided in terms of clause 13 to the departmental authorities of the plaintiff-corporation. The said clause reads as under:

"13.0 **DISPUTE AND ARBITRATION:**

13.1 No Arbitration is allowed.

13.2 In case of disputes or difference of opinion arising between the Engineer-in-Charge and the contractor, the contractor shall refer the matter to Superintending Engineer. The Superintending Engineer upon receipt of such representation shall decide the matter. The contractor may within 15 days of the receipt by him of any orders passed by the Superintending Engineer, appeal against it to the Chief Engineer. If the contractor is not satisfied by the order passed by the Chief Engineer the contractor may appeal within 15 days to the Managing Director of Maharashtra State Road Development Corporation Ltd. The decision of the Managing Director shall be final and binding on the contractor."

7. In the case of Dharma Prathishthanam (supra) while

dealing with a case arising from the arbitration proceedings under the Arbitration Act, 1940, Their

Lordships, inter alia, observed as under:

"(a) In case of arbitration without intervention of the Court, the parties must rigorously stick to the agreement entered between the two. If the arbitration clause names an arbitrator as the one already agreed upon, the appointment of an arbitrator poses no difficulty. If the arbitration clause does not name an arbitrator but provides for the manner in which the arbitrator is to be chosen and appointment, then the parties are bound to act accordingly. If the parties do not agree, then arises the complication which has to be resolved by reference to the provisions of the Act. One party cannot usurp the jurisdiction of the Court and proceed to act unilaterally. A unilateral appointment and unilateral reference-both will be illegal.

(b) If the arbitrator is not named and the authority who would appoint the arbitrator is also not specified, the appointment and reference would be to a sole arbitrator unless a different intention is expressly spelt out. The appointment and the reference - both shall be by the consent of the parties. Where the parties do not agree the Court steps in and assumes jurisdiction to make an appointment, also to make a reference, subject to the jurisdiction of the Court being invoked in that regard."

8. In the instant case, prima facie, it appears that the appointment of the arbitrator (defendant no.2) is not as per the terms of the agreement between the parties nor is it an appointment as per the provisions of the Act. Though the arbitrator appointed under the

Act has the powers to decide the preliminary issue of jurisdiction under Section 16(2) of the Act, the basic requirement that the arbitrator ought to have been appointed as per the agreement or as per the Act, has not been fulfilled and, therefore, the contentions of the respondent that the arbitration proceedings themselves would be without any foundation in law cannot be discarded. When the appointment of the arbitrator, prima facie, appears to be illegal, there is no reason why the plaintiff should be asked to go before the same arbitrator for inviting a decision on the preliminary point. In the instant case, the appointment of the arbitrator is neither as per the tender agreement nor is it an appointment under the Act. Under the circumstances, the view taken by the trial Court cannot be termed as perverse or illegal and, therefore, this appeal must fail at the threshold.

9. The appeal is hereby dismissed in limine.

10. Civil Application does not survive.

(B.H. MARLAPALLE,J.)